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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 704

JAMES J. MORAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Supp. R. 57-63) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1952 (Supp. R. 63). On March 14, 1952, Mr. Justice Jackson extended the time for filing a petition for certiorari to April 24, 1952 (Supp. R. 64). The petition for certiorari

was filed on April 12, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the subcommittee of the Kefauver Committee before which petitioner testified was a competent tribunal within the purview of the perjury statute.

2. Whether questioning as to the number of times petitioner was visited by a known "policy" operator was an inquiry as to a material matter.

3. Whether petitioner was given a fair trial in view of: (a) the trial court's denial of a motion for a continuance, (b) an allegedly inflammatory opening statement by the prosecutor, and (c) the showing of a film of the portion of the hearing at which petitioner testified.

4. Whether the evidence was sufficient to support the conviction for perjury.

STATUTE INVOLVED

18 U.S.C. 1621 (62 Stat. 773) provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be adminstered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration,

deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Southern District of New York with three violations of the perjury statute, 18 U.S.C. 1621 (R. 4-8), growing out of his testimony before a subcommittee of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce (hereafter called the Kefauver Committee or the Committee). Counts 1 and 2, which were essentially similar to count 3, were dropped, when, at the close of the evidence, the trial judge ordered the Government to elect one of the three counts (R. 242). The jury returned a verdict of guilty on count 3 (R. 281), and the court imposed a sentence of five years' imprisonment and a fine of $2,000 (R. 291). The judgment was unanimously affirmed by the Court of Appeals for the Second Circuit (Supp. R. 57).

The evidence may be summarized as follows:

On March 16, 1951, a subcommittee of the Kefauver Committee held a hearing in New York City for the purpose of gathering information about crime, corruption among public officials, and the relationship between crime and politics in New York and elsewhere (R. 217, 218). This hearing, like others held by the Committee, was extensively covered by press, newsreel, and television. Petitioner, who had held several high public offices and at the time was a member of the New York Board of Water Supply (R. 111), was called to give testimony as to his relations with one Louis Weber, a convicted "policy" or numbers racket operator (R. 117). Petitioner made no objection to testifying before the subcommittee and purported to answer all questions put to him (R. 221). The text of the interchange that forms the basis for the conviction is set out in count 3 of the indictment as follows (R. 7-8):

> The Chairman. I would like very much if we could get this Weber matter straightened out.
>
> As I understood your testimony, Mr. Moran, when you were at the Fire Department, what was your position there * * * ?
>
> * * *
>
> Mr. Moran. I was First Deputy Fire Commissioner.

The Chairman. Was that when Weber would come in once in a while, and you would see him?

Mr. Moran. That's right.

The Chairman. And you said, I believe, how many times?

Mr. Moran. Possibly three. There might have been one or two more than that. But my recollection is that there would be about three.

At the trial the Government produced four witnesses who had worked, at various times from 1946 to 1950, as receptionists in petitioner's office. Their testimony disclosed a significant discrepancy between petitioner's statements before the subcommittee and the actual frequency of Weber's visits. Thus, one witness who had served as relief receptionist during this period, taking over when the regular receptionist was at lunch or otherwise absent, testified that he had seen Weber in the reception room 60 to 65 times, and that petitioner had actually seen Weber approximately 50 times (R. 170). Another witness, who had been relief receptionist for about 20 months during this period, had seen Weber about 30 times (R. 138); while the regular receptionist testified to having seen him "forty or fifty times" and recalled having personally escorted him into petitioner's office about 15 times (R. 193).

ARGUMENT

1. Petitioner contends that since only Senator Kefauver was present during petitioner's testimony, the subcommittee lacked a quorum and was not a competent tribunal as required by the perjury statute, 18 U.S.C. 1621. The record leaves substantial doubt as to the assumption that only one Senator was present (R. 213, 227), but even if founded in fact, the contention that there could not be a quorum of one is without merit. Historically and etymologically the term "quorum" is not necessarily plural in its signification. It comes from the phrase *quorum aliquom vestrum, A.B.C.D. etc. unum esse volumus* which appeared in the commissions by which English justices of the peace were appointed. The phrase meant that of the entire body appointed "some particular justices, *or one of them*" [emphasis supplied] were always to be present when business was done. 1 Bl. Comm. 352.

"Quorum" refers to the legal competence of a body to transact business, and for that purpose the number designated by "the authority by which the body was created" is determinative. Webster's New International Dictionary (2d ed., unabridged). As stated in a similar context by Mr. Justice Jackson, dissenting in *Christoffel* v. *United States,* 338 U.S. 84, 90-91, "[E]ither House may provide expressly * * * that, for the purpose of taking sworn testimony, one or more

Committee members shall be sufficient to constitute a quorum." Here, the Senate, by the resolution creating the Committee, provided that the Committee itself might designate some number less than a majority to be a quorum "for the purpose of taking sworn testimony" [S. Res. 202, 81st Cong., 2d sess.; Gov. Ex. 2; R. 296-299].[1] On September 6, 1950, the Committee authorized the Chairman, Senator Kefauver, "to appoint subcommittees of one or more senators, of whom one member will be a quorum for the purpose of taking testimony * * *" (Gov. Ex. 1; R. 295). Prior to the hearing at which petitioner appeared, Senator Kefauver had formally appointed himself a subcommittee of one and had had that action noted on the record (R. 232). Congressional committees in the past have used one-man subcommittees without objection being raised. See *United States* v. *Norris,* 300 U.S. 564, 569; *Seymour* v. *United States,* 77 F. 2d 577 (C.A. 8).

Petitioner contends further that examination of witnesses before television and newsreel cameras so departs from due process of law as to cause the Committee to lose whatever competency it initially possessed (Pet. 12, 13). As authority for the proposition that a tribunal may lose com-

[1] A majority of the five-man committee was 3, so that only "2" and "1" were less than a majority. Had the Senate intended to exclude quorums of one, it would merely have said that 2-man subcommittees could be established for taking sworn testimony.

petency because of the manner in which its proceedings are conducted, petitioner relies on statements in *Frank* v. *Mangum*, 237 U.S. 309, 334-335, which refer to mob domination of a trial, a wholly different situation. In the instant case, the features of the hearing of which petitioner complains fall far short of the conditions contemplated in *Frank* v. *Mangum, supra* (R. 212-213). The publicity attendant upon the hearing here involved was not designed to influence the testimony or the result.[2] In fact, petitioner had previously given the same testimony at a closed hearing. (R. 107, 217.)

Moreover, while convictions following a mob-dominated trial have been set aside, *Moore* v. *Dempsey*, 261 U.S. 86; *Downer* v. *Dunaway*, 53 F. 2d 586 (C.A. 5), petitioner cites no case in which perjury by a witness at such a trial has been tolerated. Petitioner made no objection to testifying before television cameras. Having offered to give testimony, he cannot now complain of the proceedings at which his false statements were uttered. As this Court stated in *Kay* v. *United States*, 303 U.S. 1, 6,

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[2] Televising proceedings is more nearly analogous to radio broadcasting of a trial which has been held not to be unlawful *per se* or to constitute a deprivation of a defendant's constitutional rights. *Irwin* v. *Ashhurst*, 158 Ore. 61, 67, 74 P. 2d 1127, 1130; *Bisignano* v. *Municipal Court of Des Moines*, 237 Iowa 895, 911, 23 N.W. 2d 523, 532.

> When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

See *Boehm* v. *United States,* 123 F. 2d 791, 804 (C.A. 8), certiorari denied, 315 U.S. 800.

2. The matter as to which petitioner falsely testified was clearly material to the Committee's investigation. While the focus of the study was to be on the use of interstate facilities by organized crime, it is obvious that local conditions fostering the growth of criminal syndicates would be a proper and necessary subject of inquiry. Accordingly, Senate Resolution 202 authorized an investigation including in its scope crimes against state as well as federal law, and covering the "development of corrupting influences" in violation of both state and federal law (R. 297). With respect to perjury before grand juries, the test of materiality has been said to be "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." *Carroll* v. *United States,* 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763. Here petitioner's responses, which denied or minimized a relation-

ship that later testimony showed to be extensive, had the effect of barring an important line of inquiry, thereby impeding the Committee's investigation of "corrupting influences" in New York City.

3. Petitioner was given a fair trial.

(a) No prejudice resulted from the denial of petitioner's motion for a continuance based on "the very current publicity" which petitioner alleged to be "highly prejudicial" (R. 27). That the publicity attendant on the Kefauver investigations did not prejudice petitioner is shown by the negative answers on voir dire, by all but a few prospective jurors, to questions asking about their familiarity with the Kefauver Committee and with this case in particular. Thus, of the first twelve veniremen seated in the box, only four had seen any of the hearings on television, while none had seen the hearing at which petitioner testified (Supp. R. 14). As finally selected, the jury was declared to be satisfactory to petitioner (Supp. R. 55). The inference is inescapable that the trial did not take place under conditions of mass hysteria such as existed in *Shepherd* v. *Florida,* 341 U.S. 50, on which petitioner relies (Pet. 26-27). Cf. *Stroble* v. *California,* No. 373, this Term, decided April 7, 1952.

(b) Nor was there anything prejudicial in the prosecution's opening remarks. Petitioner is in-

accurate in stating that "the entire theme of the prosecutor's opening was * * * that the Government would prove a 'tie-up' between 'the slimy creatures of the underworld' and men who held 'public office.'" (Pet. 27.) The prosecution merely referred to the *Committee's* interest in establishing such a link, in order to show the scope of the hearing at which petitioner had testified and the materiality of the matter about which he was questioned. Statements concerning petitioner's career and role in public life and Weber's criminal past were not part of an "incompetent inflammatory discourse" (Pet. 29). The statements referred to evidence which was in fact presented at the trial for the legitimate purpose of showing that questions concerning the relationship between the two men were material to the Committee's investigation of crime and politics in New York City.[3] Moreover, petitioner failed to make timely objection to the opening statement, and this alone should foreclose later consideration of its propriety. *United States* v. *Lanza,* 85 F. 2d 544 (C.A. 2), certiorari denied, 299 U.S. 609.

(c) The showing of a film of the proceedings of the subcommittee while petitioner was testifying was not improper. The film tended to show that at least one Senator was present at the time the critical testimony was given so that quorum re-

[3] For this reason there is no merit in petitioner's contention that the admission of such evidence constituted error.

quirements were satisfied; that the proceedings were orderly and well conducted; and that petitioner was not harassed while giving his testimony. Since petitioner had raised questions as to the existence of a quorum (R. 87-89, 93, 212-213) and the orderliness of the hearing (R. 212-213), the film was properly admitted as bearing on these issues.

4. Petitioner's contention that the two-witness rule in perjury prosecutions was not satisfied because there was no corroboration as to the number of visits each witness observed, is entirely without merit. The basis for the rule is that "a conviction for perjury ought not to rest entirely upon 'an oath against an oath.'" *Weiler* v. *United States,* 323 U.S. 606, 609. In the instant case, petitioner's assertion that he had seen Weber only three to six times over a four-year period was contradicted by the sworn testimony of *four* witnesses. The witnesses need not testify to the same act. In *United States* v. *Palese,* 133 F. 2d 600, where the defendant was accused of falsely stating that he had never paid any person for voting, it was held that testimony of two persons who had independently received money from the defendant was sufficient to sustain a perjury conviction. The falsity of petitioner's oath was here proved by much more than the quantum of evidence required under the perjury rule.

CONCLUSION

The decision below is correct, no conflict of decisions is presented, and further review is not warranted. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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